Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

PAUL LINVILLE (Pro Se),

Petitioner,

v.

CLAY COUNTY SHERIFF'S OFFICE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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19 pg

QUESTIONS PRESENTED

1. WHETHER PERJURED WRITTEN AND VERBAL TESTIMONY ENTERED BY THE STATE INTO A STATE TRIBUNAL IS SUFFICIENT CAUSE FOR A TITLE 42 SECTION 1983 CLAIM.

2. WHETHER THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA AND THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED IN DISMISSING PETITIONER'S CLAIM UNDER RULE 12(B)6 OF THE FEDERAL RULES FOR CIVIL PROCEDURE.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioner in this cause is Paul Linville (Pro Se) counsel and Citizen of the United States.

The respondents are the Clay County Sheriffs office, et. al.,

Roger Crosby – Correctional Officer for the Clay County Sheriffs Office

Michael Mitchell – Correctional Officer for the Clay County Sheriffs Office.

Honorable Henry Lee Adam Jr – U.S. District Court Judge Middle District of Florida

Honorable Judges Dubina, Marcus and Wilson, Circuit Court Judges for the Eleventh Circuit

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STATUTE

28 U.S.C. § 1254 1

PETITION FOR A WRIT OF CERTIORARI

PAUL LINVILLE, Petitioner, respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals was not published.

JURISDICTION

The opinion of the Court of Appeals was entered on November 9, 2001, no petition for rehearing was filed. The Court's jurisdiction rests on 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. XIV (1) provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to

any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was arrested on August 15, 1999 and eventually charged with driving under the influence, fleeing, attempting to elude a police officer and resisting arrest without violence. Petitioner filed for and received a formal Administrative Hearing by the Department of Motor Vehicles on September 17, 1999. At the Administrative Hearing the Department of Motor vehicles upheld Petitioner's suspension after, Hearing Officer, Jennifer Davis, questioned the Breath Test Officer, Roger Crosby, regarding an unnotarized Affidavit of Refusal. At that time, Officer Crosby swore that the Affidavit of Refusal was correct and that Mr. Linville refused to submit to a breath test for blood alcohol content.

Later, on November 8, 1999, when Officer Crosby was depositioned he swore that the Affidavit of Refusal would have been notarized " . . . between 4:30 and 4:45" (clearly implying the date of August 15, 1999). The point is that the Department of Motor Vehicles received an unnotarized Affidavit of Refusal, however, later, in discovery, more than 30 days later, the same Affidavit of Refusal appeared notarized and the testimony of Officer Crosby drastically changed. The only conclusion that can be drawn is that the Affidavit of Refusal was backdated and that Officer Crosby either at the Department of Motor Vehicles or at the deposition gave perjured testimony. Given the over 30-day delay in the notarized Affidavit being presented and Mr. Linville wasn't entitled to another Department of Motor

Vehicles hearing under any circumstances and there wasn't a State avenue present to remedy the due process deprivation. The order dismissing my action under Title 42 Section 1983 was dismissed in error, based on **Matthews v. Eldridge**, 424 U.S. 319 (1976) and **Haines v. Kerner** 404 U.S. 519 (1972) and **Napue v. Illinois**, 360 U.S. 264 (1959)

REASONS FOR GRANTING PETITION

I. This Court should grant this petition because Petitioner's formal Administrative Hearing with the Department of Motor Vehicles was a tainted hearing that violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Petitioner has done everything to comply with the requirements of this court in filing an appeal as a Pro Se Litigant. He prays this Court will waive any rules that haven't been met in the clear and present interest of Justice. Petitioner was under the impression that Justice was the goal and that it didn't depend upon a person's ability to afford to retain Counsel. It is clear, that his 14th Amendment Right has been violated.

II. A writ of Certiorari should be issued to determine whether Petitioner's rights under the Fourteenth Amendment were violated when his State tribunal was tainted by perjured written and oral testimony.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

PAUL LINVILLE
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APPENDIX A

FINAL ORDER OF LICENSE SUSPENSION

STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES
DIVISION OF DRIVER LICENSES
BUREAU OF ADMINISTRATIVE REVIEWS
7439 WILSON BOULEVARD
JACKSONVILLE, FLORIDA 32210-3597

Paul Eugene Linville
DL# L514-685-63-206-0
C/O Adam B. Allen, Esquire
215 Washington Street
Jacksonville, FL 32202

After carefully considering all evidence received at the formal review pertaining to the suspension of your driving privilege (pursuant to s. 322.2615, FS) for refusal to submit to a breath, blood or urine test, the hearing officer finds as follows:

FINDINGS OF FACT

On August 15, 1999, at 1:41 a.m., Deputy D.E. Cole, of the Orange Park Police Department, stopped Paul Eugene Linville after observing him driving his vehicle and failing to maintain a single lane. Mr. Linville approached a stop sign, slammed on brakes and almost ran into the rear of a stopped vehicle.

Deputy Cole observed Mr. Linville to have a strong odor of an alcoholic beverage on his breath, glassy, bloodshot eyes and slow reaction time when asked for his license. Deputy Cole asked Mr. Linville to exit his vehicle. Mr. Linville drove off, fled into a cul-de-sac, exited his vehicle and fled.

Deputy Cole apprehended Mr. Linville and placed him under arrest.

Deputy Cole arrested Mr. Linville for DUI and transported him to jail. The Implied Consent Warnings were read and Mr. Linville refused to submit to the breath test. Mr. Linville was suspended for refusal to submit to the breath test.

Objection to DDL6 (Refusal affidavit) not being attested to or notarized is overruled. Breath Technician under oath stated that he prepared the document and all the information contained in it to be true and correct. The hearing officer through documents and testimony finds enough evidence to sustain suspension.

CONCLUSIONS OF LAW AND FACT

1. The arresting law enforcement officer did have probable cause to believe that you were driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances.

2. You were lawfully arrested and charged with a violation of Section 316.193, Florida Statutes.

3. You were informed that if you refused to submit to a breath, blood, or urine test your driving privilege would be suspended for a period of one year, or in the case of a second or subsequent refusal, for a period of 18 months.

4. You did refuse to submit to a blood, breath, or urine test after being asked to take the test by a law enforcement or correctional officer. Based upon the above findings of fact and the conclusions of law, the hearing officer

concludes that your driving privilege was properly suspended and is sustained effective 09/29/99. Your suspension is for a period of 1 year effective 08/15/99 to expire 08/14/00. Florida law requires that you surrender all driver licenses. If you have a license in your possession, please mail it to the address listed above.

Appeal of your suspension may be initiated by filing a petition for writ of certiorari to the circuit court within 30 calendar days of this order by following the procedure specified in s. 322.31, FS

This decision of the Department of Hearing Officer has no bearing on any DUI trial. If you are convicted of a DUI charge in court, your driving privilege will be revoked according to Florida law. You will be required to surrender to the court all driver licenses in your possession.

Ordered this 17th day of September, 1999.

/s/ JR Davis
JR Davis, Hearing Officer

Bureau of Administrative Reviews

APPENDIX B

United States District Court
Middle District of Florida
Jacksonville, Florida
Jacksonville Division

PAUL E. LINVILLE

Plaintiff
Case No. 3:00-CV-906-J25TEM

v.

CLAY COUNTY SHERIFF'S OFICE, et al.,

Defendants

_____/

ORDER

This cause is before the Court on Defendants Clay County Sheriff's Office and Roger M. Crosby's Motion to Dismiss (Dkt. 4), Plaintiff's response (Dkt. 13), Defendant Michael J. Mitchell's Motion to Dismiss (Dkt. 13) and Plaintiff's response (Dkt. 15). Upon consideration, the Court finds as follows:

Plaintiff's complaint, filed pro se, alleges that his due process rights were violated by the falsification of affidavits by the Clay County Sheriff's office. As a result of the allegedly falsified affidavits, Plaintiff's driver's license was suspended. Defendants move to dismiss the complaint against them in its entirety because the complaint fails to state a cause of action, Plaintiff failed to exhaust adequate state remedies, the Clay County Sheriff's office is not a proper defendant, and the claims against Roger M. Crosby and Michael Mitchell in their official capacities are redundant.

Facts Alleged in the Complaint

On February 15, 1999, Plaintiff was arrested by the Clay County Sheriff's office for driving under the influence. At the time of his arrest, Plaintiff refused to take a breath test. As a result of Plaintiff's arrest and refusal to take a breath test, an administrative hearing was held and resulted in a suspension of Plaintiff's driver's license. Plaintiff alleges that the affidavits submitted at the hearing were not notarized but the affidavits given to Plaintiff during discovery were notarized. As a result of the outcome of the administrative hearing, Plaintiff has filed this action alleging violations of his due process rights.

Motion to Dismiss Standard

A Rule 12(b)(6) request for dismissal for failure to state a claim upon which relief may be granted is appropriate only if "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In making this determination the Court is restricted to consideration of the facts in the complaint and must be viewed in the light most favorable to the plaintiff. Quality Foods De Centro America v. Latin American Agribusiness Dev. Cor., S.A., 711 F.2d 989, 997-95 (11th Cir. 1983).

Discussion

Defendants assert that Plaintiff's complaint must be dismissed because Plaintiff cannot state a claim for a violation of either his substantive or procedural due

process rights. First, Defendants argue that substantive rights created by state law are not subject to due process protection. The Eleventh Circuit has stated that:

> areas in which substantive rights are created on by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process clause because "substantive due process rights are created only by the Constitution." Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 229, 106 S. Ct. 507, 515, 88 L. Ed. 2d 523 (1985) (Powell, J., concurring). As a result, these state law based rights constitutionally may be rescinded so long as the elements of procedural – not substantive – due process are observed.

McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994), cert. denied, 513 U.S. 1110 (1995). Thus, defendants argue, and the Court agrees, Plaintiff cannot state a substantive due process claim because the right he was allegedly denied, possession of a driver's license, is a state created right. Consequently, Plaintiff's substantive due process claim should be dismissed. Defendants also assert that Plaintiff has failed to state a cause of action based on a violation of his procedural due process rights. Defendants concede that Plaintiff has a substantial property right in his driver's license; but, they argue Plaintiff was not deprived of due process before his driver's license was suspended. Defendants point out that Plaintiff received written notice of the opportunity to present his side of the story and to cross-examine witnesses. Furthermore, Defendants assert that Plaintiff has not been deprived of due process because his has failed to his remedies.

A procedural due process claim does not arise "unless and until the State fails to provide due process." McKinney, 20 F.3d at 1557 (quoting Zinermon v. Burch, 494 U.S. 113, 123 (1990). Furthermore, "the state must have the opportunity to remedy the procedural failings of its subdivisions and agencies in the appropriate form ... before being subjected to a claim alleging a procedural due process violation." Cotton v. Jackson, 216 F.3d 1328, 1331 (11th Cir. 2000) (internal quotations omitted). In this case, Defendants did not fail to provide Plaintiff with due process because Plaintiff never sought due process. After the administrative hearing, Plaintiff had the right to seek a writ of certiorari in the state circuit court. Plaintiff chose not to do this. Having failed to utilize the full process available to him, Plaintiff could not have been deprived of due process. Consequently, Plaintiff's due process claim must fail.

Accordingly, it is

ORDERED:

1. Defendants Clay County Sheriff's Office and Roger M. Crossbar's Motion to Dismiss (Dkt. 4) is **GRANTED**.

2. Defendant Michael J. Mitchell's Motion to Dismiss (Dkt. 13), is **GRANTED**.

3. The Clerk is directed to close this file and terminate all pending motions.

DONE AND ORDERED at Jacksonville, Florida, this 25th day of May, 2001.

APPENDIX C

IN THE UNITED STATE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-13115
Non-Argument Calendar

D.C. Docket No. 00-00906-CV-J-25

PAUL E. LINVILLE,

Plaintiff-Appellant,

versus

CLAY COUNTY SHERIFF'S OFFICE, ROGER M. CROSBY, Acting in his official capacity for the Clay County Sheriff's Office, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(November 9, 2001)

Before DUBINA, MARCUS, AND WILSON, Circuit Judges.

PER CURIAM:

Appellant Paul E. Linville ("Linville") appeals the district court's order dismissing his pro se civil rights action brought under 42 U.S.C. § 1983 for failure to state a claim upon which relief could be granted, Fed.R.Civ.P. 12(b)(6).

Linville argues on appeal that the district court erred in dismissing his section 1983 claim because false testimony was allowed during his driver's license revocation hearing. Linville alleges that he was not afforded an opportunity to amend his complaint before the Defendants' Motion to Dismiss for Failure to State A Claim was ruled upon. Finally, he asserts that the 30-day period to file for relief in the state court expired by the time he discovered the alleged falsification, thereby foreclosing a possible appeal to state court. Linville does not appeal the district court's dismissal with prejudice of his claim against Kate Feldman.

This court reviews a grant of a Motion to Dismiss under Rule 12(b)(6) for failure to state a claim de novo, accepting the allegations in the complaint as true and construing them in the light most favorable to the Plaintiff, Shands Teaching Hosp. and Clinics, Inc. v. Beech St. Corp., 208 F.3d 1308, 1310 (11th Cir. 2000). A complaint should not be dismissed pursuant to Rule 12(b)(6) for failure to state a claim unless it is clear that no relief can be granted under any set of facts that could be proven in support of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957). Generally, the existence of an affirmative defense will not support a Rule 12(b)(6) motion unless the defense is apparent on the face of the complaint. Fortner v. Thoms, 983 F.2d 1024, 1028 (11th Cir. 1993). There is no requirement that the district court provide notice and an opportunity to amend following a defense motion pursuant to Rule 12(b)(6). United States v. One Colt Python. 357 Cal. Revolver, S/N T03461 w/ Holster, 845 F.2d 287, 289 (11th Cir. 1988). However, where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to

amend the complaint before the district court dismisses the action with prejudice. Bank v. Pitt, 928 F.2d 1108, 1112, 201 F.3d 1313, 1315 (11th Cir. 2000).

After reviewing the record, we conclude that the district court correctly determined that Linville failed to fully utilize the state process available to him to redress his due process claim. Linville was required to allow the state process an opportunity to remedy any procedural violation. Linville could not have suffered a violation unless and until the State of Florida refused to provide a means to remedy the due process deprivation. See McKinney v. Pate, 20 F.3d 1550, 1563 (11th Cir. 1994), cert. denied, 513 U.S. 1110 (1995). Because Linville did not allow the state appellate process to remedy his alleged due process violation, the district court did not err in dismissing Linville's claim. Accordingly, we affirm the district court's judgment of dismissal.

AFFIRMED.